IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 83 of 1988

in

FIRST APPEAL No 1000 of 1975

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL and

MR.JUSTICE A.M.KAPADIA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

UNION OF INDIA

Versus

HARILAL TALAKCHAND

Appearance:

MR RM VIN for Appellant

MS KJ BRAHMBHATT for Respondent No. 1

MR DU SHAH for Respondents Nos. 2 to 4

NOTICE SERVED for Respondent No. 5

MR SK JHAVERI for Respondent No. 6

CORAM : MR.JUSTICE J.M.PANCHAL and
MR.JUSTICE A.M.KAPADIA
Date of decision: 25/01/2000

ORAL JUDGEMENT (Per J.M. Panchal, J.)

1. The judgment challenged in this appeal preferred under clause 15 of the Letters Patent is in favour of the plaintiff, now the respondent No.1, for Rs.10,428.06 Ps. together with proportionate costs of the suit with running interest at the rate of 6% per annum from the date of filing of the suit till the realisation thereof, and against the original defendants Nos.1 and 6, now the appellant and the respondent No.6 respectively. For the sake of convenience, we propose to refer to the parties with their original status in the suit.

2. The Plaintiff - Harilal Talakchand Shah is a resident of Bhavnagar and deals in cotton waste. He had contracted to purchase 160 quintals of 40-60 komber cotton waste at the rate of Rs.323/- per quintal from the defendant No.5 - Mill Company which is situated at Morvi. The plaintiff wanted to transfer 70 bags of cotton waste worth Rs.10,500/- from the factory of the defendant No.5 to his shop at Bhavnagar. Therefore, he entered into a contract with the defendant No.1 - Jugaldas Amritlal Shah for carriage of said 70 bags of cotton waste from Morvi to Bhavnagar, at the rate of Rs.3.50 Ps. per bag. It was agreed upon between the plaintiff and the defendant No.1 that the defendant No.1 would bring the goods by his public carrier bearing registration No. GTG 155. The plaintiff handed over a chit Ex.84 to the defendant No.1 whereby the plaintiff had requested the defendant No.5 Mill Company to deliver the goods to the bearer of the chit in truck bearing registration No.GTG 155. By the said chit the defendant No.5 was asked to give a chit showing the weight and number of bags delivered. Another chit Ex.85 written by the Munim of the plaintiff informing the Manager of the defendant No.5 that a draft for Rs.10,000/- dated December 2, 1972 drawn on State Bank of Saurashtra, Bhavnagar had been sent which should be credited to the plaintiff's account and a stamped receipt should be sent, was also handed over to the defendant No.1. The plaintiff got the goods to be transported through truck bearing registration No. GTG 155 insured with Jupiter General Insurance Company Limited on December 6, 1972. The defendant No.1 was not in a position to bring the goods by his truck bearing registration No. GTG 155 as it had failed and, therefore, assigned the work of transporting the goods to the defendant No.2, M/s. Devdutt & Company, a transport

company, Shihor, of which the defendants Nos.3 and 4 are partners, and handed over two chits written by the plaintiff to the defendant No.5 Mill Company, to the driver of the defendant No.2. The driver of the defendant No.2 went to Morvi on December 6, 1972 to bring the goods from the defendant No.5 with truck bearing registration No. GTC 2727 belonging to the defendant No.2. The defendant No.4 took delivery of the goods in question on production of the chits Exhibits 84 and 85 and loaded them in the truck bearing registration No. GTC 2727. For going from Morvi to Bhavnagar by road, one has to pass through Sanala - Virpur road at which juncture on the other side of the road a narrow gauge railway line runs parallel to the said road for about 1 Km. According to the driver of the truck bearing registration No. GTC 2727, the goods and the truck caught fire due to the sparks of burning coal that emitted from the Passenger Train No. 484 Dn. and perished. On receiving the information that the goods had perished in fire, the plaintiff lodged claim with Jupiter General Insurance Company Limited but the insurance company rejected the claim made by the plaintiff, by an intimation dated May 5, 1973, on the ground that the fire had taken place while the goods were being transported in truck bearing registration No. GTC 2727 and not in truck bearing registration No. GTG 155. According to the plaintiff, the defendant No.1 had committed breach of the contract by entrusting the work of transport to the defendants Nos.2 to 4 without his knowledge or consent and was liable for damage caused to the goods. It was also the case of the plaintiff that the defendants Nos. 1 to 4 were also liable as common carriers of the goods whereas the defendant No.5 was liable because in spite of specific instructions to send the goods in truck bearing registration No. GTG 155, the defendant No.5 had delivered the goods to the defendant No.4, a partner of the defendant No.2, and loaded them in truck bearing registration No. GTC 2727. It was also asserted by the plaintiff that the goods caught fire due to the sparks which came out of the running railway engine on account of the negligence and misconduct of the driver of the defendant No.6 as a result of which the defendant No.6 was also liable to satisfy his claim for damage to the goods. Under the circumstances, the plaintiff instituted Special Civil Suit No. 77 of 1973 in the Court of the learned Joint Civil Judge (S.D.)., Bhavnagar and prayed for a decree of Rs.11,379.16 Ps. against all the defendants.

3. The defendant No.1 in his written statement at Ex.50, inter alia, contended that no contract was entered

into between him and the plaintiff for bringing the goods from the defendant No.5 Mill Company in his public carrier bearing registration No. GTG 155 and, therefore, the suit was liable to be dismissed against him. In the alternative, it was pleaded that he was not legally liable to satisfy the claim of the plaintiff because the fire had taken place due to negligence of driver of railway engine which in turn was responsible for sparks coming out of the running railway engine. The plea regarding suit being bad for misjoinder of parties and misjoinder of causes of action was also raised by the defendant No.1.

4. The defendants Nos.2, 3 and 4 contested the claim of the plaintiff by filing written statement at Ex.46 and contended, inter alia, that as there was no privity of contract between them and the plaintiff and as they did not act as a common carrier, suit was not maintainable against them. It was also contended by those defendants that their truck along with suit goods was destroyed because of the fire which broke out due to sparks coming out of the running railway engine and, therefore, the plaintiff was not entitled to recover any amount from them.

5. The defendant No.5 controverted the claim of the plaintiff by filing written statement at Ex.53 and contended that as per the contract, the goods were to be delivered to the plaintiff or to his agent at Morvi on payment of price and as the defendant No.5 had delivered the goods as per the instructions of the plaintiff, the suit against the defendant No.5 was liable to be dismissed.

6. The defendant No.6 pleaded in the written statement at Ex.47 that the goods were not destroyed because of the fire caused by burning coal sparks coming out of the railway engine nor the railway engine driver was negligent at all and as the railway engine was fitted with fire arrester, the suit against the Union of India, owning the Western Railways should be dismissed.

7. Upon rival assertions of the parties, as many as 17 issues were framed at Exh.55 for determination by the learned trial Judge.

8. The parties to the suit adduced oral as well as documentary evidence in support of their respective case. The learned trial Judge, on appreciation of evidence, held that it was proved by the plaintiff that he had contracted to purchase from the defendant No.5, Arunodaya

Mills, 160 quintals of komber cotton waste at the rate of Rs.323/- per quintal on November 20, 1972 and that the plaintiff had entered into a contract with the defendant No.1 to bring the goods from the defendant No.5 in public carrier bearing registration No. GTG 155 belonging to the defendant No.1. The trial court found that the value of the goods to be transported was Rs.10,428.06 Ps. and not Rs.10,500/- as was asserted by the plaintiff. The trial court concluded that the defendant No.1 committed breach of contract entered into with the plaintiff and negligently entrusted the transport work to the defendants Nos.2 to 4. After taking into consideration the evidence led by the railway employees, the trial court deduced that it was not proved by the plaintiff that the goods were destroyed in transit from Morvi to Bhavnagar on Sanala - Virpur road due to sparks of burning coal coming out of the running railway engine of the defendant No.6, nor was there any misconduct or negligence on the part of the engine driver of the defendant No.6. The learned trial Judge further held that there being no privity of contract between the defendants Nos.2 to 4 with the plaintiff, the defendant No.1 was liable to satisfy the claim of the plaintiff. The learned trial Judge also held that the defendant No.5 had effected delivery of the goods as instructed by the plaintiff and was not liable for the damage caused to the goods. In view of the permission which was granted by the trial court to the plaintiff under Section 20 (b) of the Civil Procedure Code, 1908 to implead the defendant Nos.5 and 6 as parties, as well as having regard to other factors, the trial court found that the Court of Civil Judge (S.D.)., Bhavnagar had jurisdiction to hear and decide the suit and the suit was not bad for multifariousness. In view of the above referred to conclusions, the trial court decreed the suit against the defendant No.1 vide judgment dated July 31, 1975.

9. Feeling aggrieved by the said decree, the original defendant No.1 preferred First Appeal No. 1000 of 1975 whereas the original plaintiff filed cross-objections praying for a decree against all the defendants. The learned Single Judge by the impugned judgment has passed the decree against the original defendants Nos.1 and 6 giving rise to the present appeal by the Union of India owning Western Railways. The original defendant No.1 has filed cross-objections bearing Stamp No. 7992 of 1990 and challenged the confirmation of decree against him by the learned Single Judge.

10. Though the original plaintiff has not filed

appeal against the judgment and decree of the learned Single Judge nor cross-objections praying that the decree should be passed against the co-defendants, the question arising out of the impugned judgment is whether the decree should be passed against other defendants also in view of the submissions advanced by the learned counsel for the plaintiff as also in view of the provisions of Order 41 Rule 33 of the Civil Procedure Code. O.41 r.33 of the Civil Procedure Code enables the appellate Court to pass any order or decree to meet the ends of justice. This provision has been considered by the Supreme court in cases of: (i) Delhi Electric Supply Undertaking v. Basanti Devi and another (1999) 8 SCC 229, (ii) Mahant Dhangir v. Madan Mohan, 1987 Supp. SCC 528 and (iii) Panna Lal v. State of Bombay and others, AIR 1963 SC 1516.

In Mahant Dhangir (supra) the Supreme Court has explained the scope of Rule 33 of Order 41 of the Civil Procedure Code in the following terms:

> "The sweep of the power under Rule 33 is wide enough to determine any question not only between the appellant and respondent, but also between respondent and co-respondents. The appellate court could pass any decree or order which ought to have been passed in the circumstances of the case. The appellate court could also pass such other decree or order as the case may require. The words 'as the case may require' used in Rule 33 of Order 41 have been put in wide terms to enable the appellate court to pass any order or decree to meet the ends of justice. What then should be the constraint? We do not find many. We are not giving any liberal interpretation. The rule itself is liberal enough. The only constraint that we could see, may be these: That the parties before the lower court should be there before the appellate court. The question raised must properly arise out of the judgment of the lower court. If these two requirements are there, the appellate court could consider any objection against any part of the judgment or decree of the lower court. It may be urged by any party to the appeal. It is true that the power of the appellate court under Rule 33 is discretionary. But it is a proper exercise of judicial discretion to determine all questions urged in order to render complete justice between the parties. The court should not refuse to exercise that discretion on mere technicalities."

11. All the parties are before us. The question of liability of other defendants against whom the plaintiff has not filed appeal or cross-objections properly arises out of the impugned judgment and though the power of the appellate court under Order 41 Rule 33 is discretionary, it would be a proper exercise of judicial discretion to determine all questions urged before us in order to render complete justice between the parties. Therefore, we propose to examine the liability of other defendants also without going into technicalities.

12. Mr. R.M. Vin, learned counsel for the appellant, pleaded that no reliable evidence is adduced by the plaintiff to establish that the fire had taken place as a result of sparks coming out of railway engine and, therefore, the appeal should be accepted. It was further claimed that the evidence of railway employees examined on behalf of the defendant No.6 shows that fire arrester was fitted to the engine and as there was no possibility of sparks coming out of the railway engine, the impugned judgment should be set aside.

13. Mr. S.K. Jhaveri, learned counsel for the defendant No.1, submitted that no contract had taken place between the plaintiff and the defendant No.1 for transporting the goods of the plaintiff from Morvi to Bhavnagar and therefore the cross-objections filed by the defendant No.1 should be allowed. It was claimed that the defendants Nos.1 to 4 had a right to refuse to carry goods in the trucks belonging to them and, therefore, they cannot be regarded as a common carrier within the meaning of the Carriers Act, 1865 nor can be saddled with the liability as such. In the alternative, it was stressed that the defendants Nos.2 to 4 were duly appointed as agents by the defendant No.1 and were, therefore, liable to the plaintiff for carriage of goods in view of the Section 194 of the Indian Contract Act, 1872. What was emphasised by the learned counsel for the defendant No.1 was that there was sheer negligence on the part of the driver of the railway engine as a result of which sparks came out from the running railway engine destroying the goods and, therefore, the appeal filed by the Union of India owning Western Railways should be dismissed. The learned counsel for the defendant No.1 also pointed out that the original defendant No.5 had delivered the goods as per the instructions of the plaintiff and, therefore, the dismissal of the suit against the defendant No.5 should be confirmed by this Court. On behalf of the defendant No.1 it was further contended that the delivery of the goods was not made to

the plaintiff nor the property in the goods had passed to the plaintiff as a result of which the suit instituted by the plaintiff who was not the owner of the goods was not maintainable. Last but not the least, it was submitted that different causes of action against different persons has affected the merits of the case as well as jurisdiction of the court and, therefore, the suit of the plaintiff should have been dismissed by the learned trial Judge.

14. Mr. D.U. Shah, learned counsel for the defendants Nos.2 to 4, submitted that there was no privity of contract between the plaintiff and the defendants Nos.2 to 4 for transporting the goods from Morvi to Bhavnagar nor was there any negligence on the part of the driver of the defendant No.2 in transporting the goods from Morvi to Bhavnagar but the goods got destroyed because of the sparks coming out of the running railway engine and, therefore, dismissal of the suit against the defendants Nos.2 to 4 should be confirmed.

15. Ms. Kalpanaben Brahmbhatt, learned counsel for the original plaintiff, pleaded that concurrent finding of fact to the effect that there was contract between the plaintiff and the defendant No.1 for transporting the goods from Morvi to Bhavnagar is based on appreciation of evidence and, therefore, the same should not be disturbed by this court. It was claimed that the defendant No.1, contrary to specific instructions of the plaintiff entrusted the work of transport to the defendants Nos.2 to 4 and committed breach of contract, as a result, the finding recorded by the learned trial Judge as well as by the learned Single Judge that the defendant No.1 is liable to satisfy the claim of the plaintiff should be upheld by this court. The learned counsel for the original plaintiff asserted that the defendants Nos.1 to 4 are common carriers within the meaning of the Carriers Act, 1865 and, therefore, their liability being that of an insurer, the decree passed against the defendant No.1 should be upheld whereas the defendants Nos.2 to 4 should also be held liable for damage to the goods. While highlighting the liability of the defendant No.5 regarding suit claim, it was stressed that the defendant No.5 had effected the delivery of the goods to an unauthorized person contrary to the instructions of the plaintiff and, therefore, the defendant No.5 should also be saddled with the liability. The learned counsel for the plaintiff further pleaded that the evidence on record clearly establishes that the damage to the suit goods was caused due to fire taking place from sparks coming out of running railway engine on account of negligence and

misconduct of the driver of the defendant No.6 and, therefore, the appeal filed by the Union of India owning Western Railways should be dismissed.

16. We have heard the learned counsel for the parties at length and have also gone through the evidence on record. In view of the contentions urged by the learned counsel for the Union of India, the first question which arises for our consideration is whether the suit goods got destroyed in transit from Morvi to Bhavnagar on Sanala - Virpur road due to the sparks of burning coal coming out of running railway engine of the appellant. It is an admitted position that neither the plaintiff nor the defendants Nos.1, 3 and 4 were physically present when the goods got destroyed by fire and everything turns upon the evidence of Mohan Naran who was driving the truck bearing registration No. GTC 2727 as well as Kanji Khoda who was driving the railway engine and who was accompanied by other railway employees. From the evidence of Mohan Naran, Ex.115, it is evident that in the capacity of the driver of the truck bearing registration No. GTC 2727 he was sent to bring the suit goods from Morvi to Bhavnagar by the defendant No.4 and he got delivery of the goods in truck bearing registration No. GTC 2727 from the defendant No.5 Mill Company. According to him, he had covered the suit goods with tarpaulin as well as tied the same with ropes before leaving for Bhavnagar. Mohan Naran claimed that when he reached Sanala station, he noticed a train moving slowly and saw the engine driver loading coal inside the engine as well as sparks coming out of the engine as a result of which he took his truck ahead of the railway engine and covered a distance of about 1/2 a mile where he noticed smoke coming out of the rear side and stopped the truck. According to this witness, he tried to extinguish the fire but due to stormy wind, the fire spread all over the truck and before he could summon fire extinguisher, the truck and the goods perished. We may state that the learned trial Judge who had advantage of observing the demeanor of the witness has disbelieved this witness after taking into consideration the statements made by the witness in his cross-examination. We may mention that though a specific finding is recorded by the trial Court that fire had not taken place due to sparks flying from railway engine, the learned Single Judge has proceeded on the footing that no such finding is recorded and the learned Single Judge has not referred to cross-examination of this witness at all. The learned Single Judge, after placing reliance on a few statements made in examination-in-chief, has deduced that fire to the goods had taken place because of sparks of burning

coal coming out of the running railway engine. Therefore it has become necessary for us to evaluate evidence of this witness critically. On critical examination of the evidence tendered by this witness on oath, we are of the opinion that he is not a witness of truth. In examination-in-chief this witness has claimed that the defendant No.1 had handed over chits meant for the defendant No.5 to the defendant No.4 and had asked the defendant No.4 to bring the goods from Morvi to Bhavnagar but in cross-examination by the defendant No.1 this witness has clearly admitted that the defendant No.1 had asked him to bring the goods from Morvi to Bhavnagar and neither the defendant No.3 nor the defendant No.4 had asked him to bring the goods from Morvi. Further, at the time of taking delivery of the goods from the defendant No.5 Mill Company, this witness though had handed over chits meant for the defendant No.5 to its Manager, had never informed the Manager that he was not the driver of the truck bearing registration No. GTG 155 and that he had brought the truck bearing registration No. GTC 2727 for transporting the goods from Morvi to Bhavnagar. Though during the cross-examination by the defendant No.5 this witness has claimed that the railway engine was not fitted with fire arrester nor was there any cover, in cross-examination by the defendant No.6, i.e., Railway Administration, this witness has in no uncertain terms admitted that he has no idea as to what is fire arrester or how cover of the chimney of the railway engine is known. Again the witness asserted in the examination-in-chief that on noticing the sparks coming out of the railway engine he went with the truck ahead of the railway engine, but in cross-examination by the defendant No.6 this witness had to admit that on seeing the sparks he had tried to stop the truck. The claim of the witness before the court that he was driving the truck at the speed of 10 KMs. per hour while there was traffic on the road and at the speed of 20 KMs. per hour when there was no traffic is highly exaggerated and improbable. The evidence of this witness establishes beyond doubt that he had not seen any spark falling on the goods. Even according to him, in order to save the goods from being burnt, he had taken the truck ahead of the railway engine and covered a distance of 1/2 a mile where he had noticed thereafter smoke coming out from the rear side of the truck. This witness has not explained as to what happened between the truck going ahead of the railway engine as well as covering a distance of 1/2 a mile and his noticing smoke coming from the rear side of the truck. In fact, his assertion that he was accompanied only by the cleaner and not by any other person stands belied by Ex.116 which indicates that there

was a third person also in the truck. The reading of the evidence of this witness makes it abundantly clear that this witness has no regard for truth and has stated the story as suggested by different defendants from time to time.

17. Another tale-telling circumstance also deserves special mention. It has come in the evidence that the truck bearing registration No. GTC 2727 was the only truck belonging to the defendant No.2 which was being used for the business of transport. It is an admitted position that along with the cotton waste the truck had also perished in the fire. The evidence of the truck driver read with the evidence of the defendant No.4 who is one of the partners of the defendant No.2 makes it very clear that value of the truck was more than the value of the goods which were being transported therein. However, it is an admitted position that neither any notice was served by the defendant No.2 on the Railway Administration claiming damage for the loss of truck nor any suit was instituted against the Railway Administration claiming damage for the loss of truck on the ground that the truck was also destroyed by fire which took place because of sparks flying from the railway engine, which means that, even the story told by the driver of the truck bearing registration No. GTC 2727 to the defendant No.4 that the goods and the truck both got destroyed by reason of sparks flying from the railway engine had not inspired even confidence of any of the partners of the defendant No.2 firm. The evidence of the driver of the truck makes it manifest that several trucks had overtaken his truck and several trucks were coming from the opposite direction and, therefore, there is every possibility that fire might have taken place because of some burning substance thrown by one of the occupants of those trucks. The reading of the evidence of the driver of the truck bearing registration No. GTC 2727 leads us to believe that he has suppressed the real reason due to which the fire had taken place. Under the circumstances, we are of the opinion that the learned Single Judge has committed an error in holding that the evidence of driver - Mohan Naran establishes that the goods got destroyed in transit from Morvi to Bhavnagar, on Sanala - Virpur road, due to the sparks of burning coal coming out of the running railway engine of the defendant No.6. As we have discarded the evidence of driver Mohan Naran as being highly improbable and untrustworthy of acceptance, the Court is left with the evidence of the railway engine driver and other railway employees.

18. The evidence of railway engine driver, Kanji Khoda, is recorded at Ex.121. This witness has clearly mentioned in his evidence that the railway engine was fitted with fire arrester and no sparks were coming out of the railway engine. According to this witness, before taking the charge of the engine on December 6, 1972 he had verified whether the fire arrester was fitted in the smoke box or not and after ascertaining that fire arrester was fitted in the smoke box he had taken over the charge of the engine on December 6, 1972. This witness has stressed that when the truck was ahead by a distance of 1/2 a Km. from the engine, he had seen black smoke coming out of the truck and when he found that the truck was burning with goods he had stopped the train at a distance of 100 ft. from the truck. Though this witness has been cross-examined searchingly by the learned counsel for the other defendants as well as plaintiff, nothing has been brought on record which would raise doubt about his version as given in the examination-in-chief. This witness is amply corroborated by the evidence of Laxmishanker Ambashanker Dave, Ex.123, who was the Guard in the passenger train when the incident in question took place. Laxmishanker has specifically deposed that after the train covered a distance of 1 - 2 Kms. from Sanala Railway Station, he had heard six whistles of the railway engine and on peeping out, he found that one truck was burning at a distance. The evidence of the Guard of the train also shows that no sparks were coming out of the railway engine. Ved Prakash Ravaldas who was then Fitter in-charge at Morvi Railway Station has deposed in his evidence recorded at Ex.126 that as a supervisor he was required to look after engines in the Loco Shed and that the Engine of K-1 which was assigned for Morvi - Tankara Line was fitted with fire arrester in the smoke box. According to this witness, below the smoke chimney, spark arrester is fitted and this device is meant for arresting the sparks which would otherwise come out of the running engine. The witness has explained in detail as to what is spark arrester and stated that the spark arrester being a permanent fitting, there was no possibility of sparks coming out of the engine. What is asserted by this witness is that if there had been no fire arrester in the engine the driver could not have driven the engine at all because it is not safe to drive such an engine. The cross-examination of this witness would indicate that Engine No. 567 of Class K-1 was manufactured in 1925 but it was in running condition and was fitted with fire arrester. The evidence of Gangadas Narsi, recorded at Ex.130, shows that he was serving as a Fireman in Railways and as a Fireman it was his duty to see whether

there was sufficient quantity of water so as to generate steam. This witness has stated that it was also his duty to load coal in the engine and he had loaded coal in the engine and though smoke was coming out, no spark was coming out at all because of the device fitted in the smoke box. The evidence of Radha Meru, recorded at Ex.131, establishes that he was working as a Boiler Repairer in Morvi Railway Station on November 17, 1972 and he himself had examined the Railway Engine No. 567 as well as cleaned spark arrester of the engine. According to this witness, periodically condition of engine was required to be noted in a Register and the register was to be shown to his superior for his checking. The evidence of all these witnesses has almost gone unchallenged. The railway employees have deposed on oath before Court in a straight forward manner and there is nothing to doubt their version that the railway engine was fitted with fire arrester as a result of which the possibility of spark coming out of the running railway engine was minimised to best possible extent. The plaintiff has not led satisfactory evidence that the goods were destroyed because of fire which took place due to sparks flying from railway engine. On the other hand it is proved that there was no negligence on the part of the driver of the railway engine which resulted into destruction of the goods by fire.

19. At this stage we may refer to one decision of the Allahabad High Court with advantage. In the Secretary of State for India in Council and another v. Dwaraka Prasad, (1927) ILR 49 Allahabad 559, the respondent who was dhobi by vocation was living near the railway line. On the morning of the incident, according to him, two trains were running a race on the railway lines that ran by the dhobi's house. One of the trains was going to Delhi and the other to Bareilly and for a short distance the two trains ran parallel to each other. A spark from one of the engines burnt the thatched hut of the dhobi and along with the hut, the plaintiff's clothes that had been given to the dhobi for being washed. It was found by the court below that the two drivers were driving the two trains at a furious speed and the spark which caused the fire had come out of one of the engines. It also found that no precaution had been taken to protect the flying of sparks from the engine. The Allahabad High Court has held that the railway would be liable if it had failed to take all reasonable precautions to avoid emission of such sparks as are likely to destroy the adjoining property. Applying the principle laid down in the said decision to the facts of the present case, we find that all reasonable precautions to avoid emission of

such sparks as are likely to destroy the adjoining property were taken by the railway in the present case and, therefore, the railway cannot be saddled with the liability at all. It may be mentioned that the railway is constructed and worked under statutory powers and if there is no negligence in the construction or use of locomotives there is no liability for fires caused by the escape of sparks from the locomotives. The above discussion makes it clear that the learned Single Judge has committed an error in holding the railway liable for the claim of the plaintiff and, therefore, the appeal filed by the Union of India owning Western Railways will have to be allowed.

20. The next question which arises for our determination is whether the plaintiff had contracted with the defendant No.1 to transport cotton waste from Morvi to Bhavnagar in the truck bearing registration No. GTG 155. On behalf of the plaintiff, Jayantilal Talakchand who is his brother, is examined at Ex.62. He has categorically deposed that such a contract was entered into with the defendant No.1 and he had handed over two chits to the defendant No.2 which were addressed to the Manager of the defendant No.5, Mill Company for effecting delivery of the suit goods to the bearer of the chit in truck bearing registration No. GTG 155. If no contract had been entered into between the plaintiff and the defendant No.1 as is claimed by the defendant No.1, the number of the truck, i.e., GTG 155 would not have been mentioned in the chit dated December 2, 1972, which is produced at Ex.84. Moreover, the plaintiff had also insured the goods to be transported in truck bearing registration No. GTG 155 with Jupiter General Insurance Company Limited on December 6, 1972 and paid premium for the risk having been covered. If there was no contract between the plaintiff and the defendant No.1, the plaintiff would not have got the goods to be transported in truck bearing registration No. GTG 155 insured with Jupiter General Insurance Company Limited nor paid premium. Again, the driver of the truck bearing registration No. GTC 2727 as well as the defendant No.4 who is one of the partners of the defendant No.2 firm have asserted on oath that the defendant No.1 had entrusted the work of transporting cotton waste from the defendant No.5 Mill Company to Bhavnagar to the defendant No.4, which means that initially the contract for transport was entered into between the plaintiff and the defendant No.1. It is not the case of the defendant No.1 that in order to saddle the defendant No.1 with liability the plaintiff on one hand and the defendants Nos.2 to 4 on the other hand have colluded. The trial court as well

as the learned Single Judge on appreciation of the evidence have recorded a finding of fact that the plaintiff had entered into a contract for transportation of cotton waste from Morvi to Bhavnagar with the defendant No.1. This concurrent finding of fact is not shown to be erroneous in any manner so as to warrant our interference in the present appeal and, therefore, the said finding is hereby confirmed.

21. The next question which would arise for our consideration is regarding liability of the defendants Nos.1 to 5 for the claim made by the plaintiff. It is the specific case of the plaintiff that contrary to the terms of the contract and without informing him, the defendant No.1 had illegally entrusted the work of transport of cotton waste from Morvi to Bhavnagar to the defendants Nos.2 to 4 and had committed breach of the contract which resulted into loss of goods. The evidence of the plaintiff read with the chits at Exhs.84 and 85 as well as the plaintiff insuring the goods to be transported in truck bearing registration No. GTG 155 would indicate that the defendant No.1 had expressly undertaken to perform personally the work of transport of cotton waste from Morvi to Bhavnagar and could not have lawfully employed another to perform the said act. Though the defendant No.1 and defendant No.4 have stated in their evidence that it is usual for the transporters to employ another transporter to transport the goods if necessity arises, it is difficult to cull out any such custom of trade at all. Except bare words of the defendant Nos.1 and 4, they have not proved any instance of trade permitting a transporter to employ lawfully another transporter to perform the act of transportation in case of necessity and that too without informing the owner of the goods. Therefore, in our view, no satisfactory evidence having been led to establish trade custom as claimed by the defendant Nos.1 and 4, the claim of the defendant No.1 that he had lawfully entrusted the work of the transportation to the defendant Nos.2 to 4 cannot be upheld. In terms of Section 190 of the Indian Contract Act, 1872 the defendant No.1 had committed breach of contract entered into with the plaintiff by entrusting the work of transportation of cotton waste from Morvi to Bhavnagar to the defendants Nos.2 to 4. Moreover an agent, holding an express or implied authority to name another person to act for the principal in the absence of the agency, has named another person accordingly, such person may not be regarded as a sub-agent in terms of Section 194 of the Indian Contract Act, 1872, but an agent of the principal for such part of the business of the agency as is entrusted to him.

Therefore, the question which needs consideration is whether appointment of defendants Nos.2 to 4 by the defendant No.1 as his sub-agents would ipso facto establish a privity of contract between the plaintiff and the defendant Nos.2 to 4 even if it is assumed that the defendant No.1 had implied authority to appoint sub-agents. At para 373 of Halsbury's Laws of England, Volume No.1, the position of different kinds of sub-agents has been very succinctly and clearly stated as follows:

> "There is as a general rule no privity of contract between the principal and a sub-agent, the sub-agent being liable only to his employer, the agent. The exception is where the principal was a party to the appointment of the sub-agent, or has subsequently adopted his acts, and it was the intention of the parties that privity of contract should be established between them.
>
> There may, therefore, be said to be three classes of sub-agents: (1) those employed without the authority express or implied, of the principal, by whose acts the principal is not bound; (2) those employed with the express or implied authority of the principal, between whom and the principal there is no privity of contract; (3) those employed with the principal's authority, between whom and the principal there is privity of contract. For the acts and defaults of the first two classes, the agent is responsible to the principal".

The present case would fall within clause (2) if it is held that the defendant No.1 had implied authority of the principal to appoint sub-agent for the purpose of transport of cotton waste from Morvi to Bhavnagar. Sections 190 to 192 deal with sub-agents properly so called and which are referred to as classes 1 and 2 in the passage quoted above from Halsbury's Laws of England. Section 190 declares that an agent may not delegate to another person the performance of an act which he had expressly or impliedly undertaken to perform personally unless permitted to do so by the custom of trade or the nature of the agency. Section 191 limits the definition of a sub-agent to one who is employed by an agent and is required to act under his control. Section 192 inter alia declares that notwithstanding the appointment of a sub-agent as defined in the previous section the agent shall continue to be responsible to the principal for the acts of the sub-agent, and that the sub-agent will in his

own turn be responsible to the agent. In effect this section contemplates that in such a case a privity of contract is not established between the principal and the sub-agent in consequence merely of such appointment having been made. Section 194 deals with the third class of sub-agents referred to in the passage of Halsbury but provides that such a person is not a sub-agent within the definition of Section 191, that is to say a sub-agent properly so called, and that he is thereby deemed to be an agent of the principal and directly responsible to him. In such a case a privity of contract is ipso facto established between the principal and the person so named. But in order to bring a case within the purview of Section 194 the agent has not to prove that he had authority either express or implied to delegate his own duties to such other person but to prove that he had authority to name another person to act for the principal in the business of the agency which stands altogether on a different footing than the ordinary delegation of duties to another. In order to bring the case within the purview of Section 194 it must be established by the agent that the naming of the sub-agent was made known to the principal himself so as to bring about a privity of contract between them. This is the view expressed by a Division Bench of the Bombay High Court in Nensukhdas Shivnaraen v. Birdichand Anraj, AIR 1917 Bombay 19. The evidence on record does not indicate that the defendant No.1 had at any point of time informed the plaintiff that he had employed the defendants Nos.2 to 4 to transport the cotton waste from Morvi to Bhavnagar in another truck. There is nothing on the record to show that the plaintiff was a party to the appointment of the defendants Nos.2 to 4 as sub-agents. It is not the case of the defendant No.1 that subsequently at any point of time the plaintiff had adopted or ratified the acts of the defendant Nos.2 to 4 nor any evidence is led to prove that it was intention of the plaintiff and the defendants Nos.1 to 4 that privity of contract should be established between the plaintiff and the defendant Nos. 2 to 4. Under the circumstances, privity of contract having not been established between the plaintiff and the defendant Nos.2 to 4, the defendant No.1 himself would be liable to the plaintiff for the breach of contract and not the defendants Nos.2 to 4 who had no privity of contract with the plaintiff. The consequence of this discussion is that the defendant No.1 is liable to satisfy the claim advanced by the plaintiff for breach of contract committed by him.

22. However, the liability of the defendants Nos.1 to 4 will also have to be ascertained with reference to the

provisions of the Carriers Act, 1865. The contention raised by M/s. S.K. Jhaveri and D.U. Shah, learned counsel for the original defendants Nos.1 to 4, to the effect that the defendants Nos.1 to 4 cannot be considered to be common carriers within the meaning of interpretation clause as provided in Section 2 of the Carriers Act, 1865, is devoid of merits. "Common carrier" denotes a person, other than the Government, engaged in the business of transporting for hire property from place to place, by land or inland navigation, for all persons indiscriminately. The learned counsel for the contesting defendants would submit that "for all persons indiscriminately" means simply that carriers are at liberty to refuse the business and, therefore, the defendants Nos.1 to 4 cannot be regarded as common carriers. In our view, this is not the correct approach to be made to find out whether a person transporting for hire property from place to place can be regarded as common carrier or not. The main attribute of a common carrier is to transport for hire property for all persons indiscriminately. The question whether a carrier is a private or a common carrier depends upon the nature of the public profession made by the carrier with regard to the carriage of goods undertaken by it elsewhere. What is required in the case of a person who answers the definition of common carrier under the Carriers Act is that, he must be ready to carry for hire as a business and not as a casual occupation. It is essential that he should hold himself out as being ready to carry goods for any person, no matter who he may be. In determining whether a person is a common carrier or not the provisions of Motor Vehicles Act are also relevant. The provisions of Sections 2 (23), 54 and 55 of the Motor Vehicles Act, 1939, which are applicable to the facts of the present case show that it is a matter of public employment that a licence is granted and not for doing the transport work for only a particular individual or individuals casually. In Hussainbhai Mulla Fida Hussain v. Motilal Nathulal and another, AIR 1963 Bombay 208, a Division Bench of the Bombay High Court has held that the liability of a common carrier arises from the public employment in which he is engaged and the determination of common carrier depends upon whether the transaction was of a casual nature or as a result of public employment. According to the Bombay High Court, the test to determine whether a person is a common carrier or not is what he publicly professes. The public profession may be made apparent by a public notification or by actually indiscriminately carrying all goods. What is emphasised therein is that in determining whether a person is a common carrier or not the provisions of Motor Vehicles

Act are also relevant and of important consideration because it is a matter of public employment that a licence is granted and not for doing transport work only for an individual or individuals casually. The plaintiff has clearly averred in his plaint that the defendants Nos.1 to 4 are doing business as common carriers and this has not been denied by the defendants in their respective written statements. It is not the case of the defendant No.1 or the defendants Nos.2 to 4 that though licence was granted to them under the provisions of the Motor Vehicles Act, 1939, they were doing the transport work only for a particular individual or individuals casually. The words "at any time and at any place" in Section 2 (23) of the Motor Vehicles Act, 1939, have got considerable importance and they indicate that without a legitimate excuse, a public carrier cannot refuse to carry goods. If he does so because he wants exorbitant charges or for some other unjustifiable reason and representations are made to the transport authority concerned, his licence can be withdrawn. Having regard to the totality of the facts and circumstances of the case, the defendants Nos.1 to 4 will have to be regarded as common carriers.

23. The liability of the common carrier is in terms of Sections 6 and 8 of the Carriers Act. A common carrier is not a mere bailee of goods entrusted to him. He is an insurer of the goods. He is answerable for the loss of goods even when such loss is not caused by the negligence or want of care on his part and the act of God and of State's enemies are excepted. This concept of liability of a common carrier is applied in India uniformly. The provisions of the Contract Act do not govern the liability of a common carrier nor they do over-ride the provisions of the Carriers Act. It is open to any common carrier to get himself out of the scope of absolute liability with regard to any particular contract of carriage by entering into a special contract with regard to the particular carriage with his customer. However even such contract would be of no avail against gross negligence or criminal acts. In the absence of any case that the carrier engaged in road transport entered into any special contract with the customer negativing the liability in the event of loss caused due to the causes occasioned by reason beyond his control, he is liable for the loss of goods destroyed on the way. This proposition of law becomes clear if one refers to Division Bench decision of the Bombay High Court in Hussainbhai Mulla Fide Hussain (supra) and host of judgments rendered by different High Courts of our country on the point.

24. In the Irrawaddy Flotilla Company v. Bugwandas, ILR Calcutta Vol. 18, page 620, bales had been put on board to be carried from Mingyan, in Upper Burma, down the river to Rangoon, and whilst the Yomah was lying at the former place, the fire broke out from some unexplained cause. The respondent filed suit a for the value of 195 bales of cotton destroyed by fire whilst on board the steamship Yomah belonging to the appellant, to be carried by them. A decree was passed by the trial court. In appeal, the question which was considered was whether the appellant company as carriers of goods for hire were answerable for the goods independently of any negligence on their part, or were responsible only for that amount of care which the Indian Contract Act, 1872, in the Sections 151 and 152 relating to bailment, required of all bailees alike in the absence of special contract. Their Lordships of the Privy Council found that the High Court of Bombay had held that the effect of the Indian Contract Act, 1872 was to relieve common carriers from the liability of insurers answerable for the goods entrusted to them 'at all events', except in the case of loss or damage by the act of God, or the Queen's enemies, and to make them responsible only for that amount of care which the Act requires of all bailees alike in the absence of special contract, whereas the Calcutta High Court had concluded that the liability of common carriers was not affected by the Act of 1872 at all. Their Lordships of the Privy Council determined which of these authorities was to be preferred. After elaborate discussion of the provisions of the Carriers Act and the Indian Contract Act, Their Lordships of the Privy Council held as under:

" It was hardly disputed that the liability of a common carrier as an insurer was an incident of the contract between the common carrier and the owner of the property to be carried. Is that incident inconsistent with the provisions of the Act of 1872? No one could suggest that it was inconsistent, merely by reason of its being a term of the contract implied and not expressed. Then it would seem that the proper way of trying whether it is or is not inconsistent with the provisions of the Act of 1872 would be to write it out as part of the contract. Would it then be inconsistent? Clearly not. It would be within Section 152; it would be a special contract, saved by that section. It is difficult to see how a term of a contract can be inconsistent with the provisions of the Act of 1872 if it is

> implied, while it would not be inconsistent if it were expressed in the contract.
>
> These considerations lead their Lordships to the conclusion that the Act of 1872 was not intended to deal with the law relating to common carriers, and notwithstanding the generality of some expressions in the chapter on bailments, they think that common carriers are not within the Act. They are therefore compelled to decide in favour of the view of the High Court of Calcutta, and against that of the High Court of Bombay."

The binding decision of the Privy Council quoted above makes it clear that the liability of a common carrier as an insurer is an incident of the contract between the common carrier and the owner of the property to be carried and that liability is not affected by the provisions of the Indian Contract Act, 1872. The submission that the decision of the Privy Council is based on Common Law of England and therefore should not be followed is stated to be rejected. What is held by the Privy Council is that common law of England is incorporated in the provisions of the Carriers' Act, 1865 and it is incorrect to say that the Privy Council has interpreted provisions of the Carriers' Act, 1865 on the basis of common law of England. The duties and liabilities of common carriers throughout India are now recognized by the Indian Legislature in the Carriers Act, 1865 and the Act is framed on the lines of England Carriers Act of 1830. The Privy Council has elaborately considered the provisions of the Indian Contract Act as well as the Carriers Act, 1865 and held that the liability of a carrier is that of an insurer. We may mention that the judgment rendered by the Privy Council has been followed by all High Courts of our country and is good law as on today. Principle enunciated therein is also stated by learned Single Judge of this court in Transport Corporation of India Ltd. v. Indian Rayon Corporation, Veraval and another, 1992 (1) GLH 277. Therefore we hold that the defendants Nos.1 to 4, who are common carriers, are liable to answer the claim made by the plaintiff as insurer in terms of Sections 6 and 8 of the Carriers Act, 1865 irrespective of the fact whether the driver of the defendant No.2 was negligent in transporting cotton waste from Morvi to Bhavnagar. Here we may refer to an instructive decision of Karnataka High Court in Transport Corporation of India (P) Ltd. v. Oriental Fire and General Insurance Company Ltd., and another, Vol. II (1987) Accident and Compensation Cases,

page 140. Therein the plaintiff No.2 had sent copper scrap to the Indian Cable Co. Calcutta. The Indian Copper Co. converted copper scrap into copper coils and consigned to the defendant No.1 for being transported from Tatanagar to Bangalore, the consignee being the plaintiff No.2. Though the defendant No.1 issued lorry receipts, the defendant No.1 in turn entrusted the same to the defendant No.2 for actual transport. At the time of delivery it was found that there was shortage of copper coils. The consignment had been insured with plaintiff No.1 and insurance company had made payment as well as obtained letter of subrogation. Thereafter suit was filed for value of shortage of copper coils. After considering the provisions of the Carriers Act, 1865, the Division Bench of Karnataka High Court has held as under:

> "12. There can be no doubt that the defendant No.2 is the agent of defendant No.1 as per the facts and circumstances of this case. Therefore, the provisions in Section 8 of the Carriers Act apply to defendant - 2. Hence, though there is no privity of contract between the plaintiffs and defendant - 2, the liability of defendant - 2 would be co-extensive with the liability of defendant - 1 so far as the plaintiffs are concerned. This view is supported by the decision in Vidya Ratan v. Kota Transport Co. Ltd. (AIR 1965 Rajasthan 200)."

The facts of the case quoted above are identical to the facts of the case on hand. Applying the principle laid down therein to the facts of the present case, we hold that though there is no privity of contract between the plaintiff and the defendants Nos.2 to 4, the liability of the defendants Nos.2 to 4 is co-extensive with the liability of the defendant No.1, so far as the plaintiff is concerned.

25. The next question which arises for our consideration is regarding liability of the defendant No.5 Mill Company. The driver of the defendant No.2 had handed over two chits Exhs.84 and 85 to the Manager of the defendant No.5 Mill Company. However, without verifying whether truck bearing registration No. GTG 155 was brought for transporting cotton waste from the mill company of the defendant No.5 to Bhavnagar, the Manager of the defendant No.5 Mill Company had permitted the goods to be loaded in truck bearing registration No. GTC 2727. Even gate pass was prepared on the basis that the cotton waste was loaded in truck bearing registration No. GTC 2727. Pravinchandra Chhotalal who was working as a

Clerk in the defendant No.5 Mill Company was examined at Ex.118. He has stated that after accepting the authority letter and draft, cotton waste was handed over to the truck driver from godown without verifying the fact whether the truck bearing registration No. GTG 155 was brought or not. In view of the acceptance of tender of the plaintiff it was incumbent upon the defendant No.5 to deliver the goods and load them as per the instructions of the plaintiff. The defendant No.5 was not expected to load the goods in any truck except in the truck bearing registration No. GTG 155. There is no manner of doubt that contrary to the instructions of the plaintiff the defendant No.5 had permitted the goods to be loaded in the truck bearing registration No. GTC 2727. In order to absolve itself from liability, even gate pass was subsequently corrected mentioning the registration number of the truck as GTG 155. Having regard to all these circumstances, we are of the opinion that the defendant No.5 had committed breach of the contract which he had entered into with the plaintiff and is equally responsible for the loss caused to the goods because the defendant No.5 Mill Company had completely disregarded the instructions mentioned in the chit Ex.84 and permitted the goods to be loaded in another truck which ultimately caught fire and due to which the goods also perished. From the above discussion, it is evident that the defendants Nos.1 to 5 are jointly and severally liable for the claim advanced by the plaintiff in his suit.

26. The contention that misjoinder of causes of action and parties has affected the merits of the case as well as jurisdiction of the Court and therefore the suit filed by the plaintiff should be dismissed, has no substance. This plea was raised before the trial court but it was not accepted. It is relevant to notice that the agreement between the plaintiff and the defendant No.1 to transport cotton waste in truck bearing registration No. GTG 155 from Morvi to Bhavnagar had taken place at Bhavnagar. The defendant No.1 had entrusted this work in turn to the defendants Nos.2 to 4 at Bhavnagar. Therefore it cannot be said that the suit against the defendants Nos.1 to 4 either suffers from the vice of misjoinder of parties or causes of action. It is true that the plaintiff's cause of action against the defendant No.1 is based on the breach of contract whereas his cause of action against the defendants Nos.1 to 4 is based under the Carriers Act and cause of action against the defendant No.5 is based on breach of contract whereas the cause of action against the defendant No.6 is based on tort. However, a plain reading of the plaint and the

evidence on record makes it very clear that all these causes of action arose out of the same transaction and common question of law and facts arose between the plaintiff and the defendants in terms of the provisions of Order 1 Rule 3 of the Civil Procedure Code. Order 1 Rule 3 of the Civil Procedure Code provides that all the persons may be joined in one suit as defendants where (a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative; and (b) if separate suits were brought against such persons, any common question of law or fact would arise. In our view, right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions exists against the defendants, jointly, severally or in the alternative. Moreover, if separate suits were brought against such defendants, common question of law would have arisen for consideration of the Court. Order 2 rule 3 of the Civil Procedure Code enables a plaintiff to unite in the same suit several causes of action against the same defendant or the same defendants jointly. Under the circumstances, we are of the opinion that the suit does not suffer from the vice of misjoinder of parties or causes of action. Section 99 of the Civil Procedure Code provides that no decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder or non-joinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court. It is relevant to notice that the plaintiff had filed an application seeking leave of the Court to implead the defendants Nos.5 and 6 as contemplated by section 20 (b) of the Civil Procedure Code and that application was granted by the trial court vide order dated July 6, 1974. This order was not challenged either by the defendant No.5 or defendant No.6 in appeal before the learned Single Judge. No grievance is made on behalf of the defendant No.5 or defendant No.6 that having regard to the facts of the case the trial Court was not justified in granting leave under Section 20 (b) of the Civil Procedure Code to the plaintiff to implead them as defendants Nos.5 and 6 in the suit. The learned counsel for the original defendant No.1 has failed to point out that misjoinder of parties and causes of action has affected the merits of the case or jurisdiction of the Court. Under the circumstances, the decree passed against the defendant No.1 by the trial court as confirmed by the learned Single Judge is not liable to be set aside on the ground of misjoinder of parties and

causes of action.

27. The last contention that the property in goods did not pass to the plaintiff and, therefore, the suit was not maintainable is factually incorrect and has no substance at all. The plaintiff has stated in his evidence that a contract for purchase of 160 quintals of komber cotton waste at the rate of Rs.323/- per quintal was entered into between him and the defendant No.5 Mill Company on November 20, 1972. This is not denied by the defendant No.5. This assertion made by the plaintiff is amply corroborated by the letter at Ex.64. As observed earlier, on behalf of the defendant No.5 Mill Company, its Clerk Pravinchandra Chhotalal was examined at Ex.118. The witness has clearly stated on oath that delivery of the goods was effected after acceptance of authority letter and draft. It is not the case of the defendant No.5 Mill Company that after acceptance of authority and draft and after effecting delivery of the goods to the driver of the defendant No.2, the defendant No.5 Mill Company had continued to be the owner of the goods. Exhs. 64, 65, 66 and 67 would indicate that the property in the goods had passed to the plaintiff after delivery was effected. Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. For the purpose of ascertaining the intention of the parties regard should be had to the terms of the contract, the conduct of the parties and the circumstances of the case. Unless a different intention appears, the rules contained in Sections 20 to 24 of the Sale of Goods Act, 1930 can be taken into consideration for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. In terms of Section 20 of the Sale of Goods Act, 1930 where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price or the time of delivery of the goods, or both, is postponed. In view of the acceptance of tender of the plaintiff, it will have to be held that the contract for sale of komber cotton waste related to specific goods which were in a deliverable state and, therefore, the property in the goods passed to the plaintiff when the contract was made and it was immaterial that the time of payment of the price or the time of the delivery of the goods was postponed. Even if it is held that the goods contracted to be sold were unascertainable goods, it is important to notice that the goods were in a deliverable state and

were unconditionally appropriated to the contract by the defendant No.5 with the assent of the plaintiff and, therefore, the property in the goods passed to the plaintiff. It is well settled that where in pursuance of a contract a seller delivers goods to the buyer or to a carrier or to a bailee who are named by the buyer for the purpose of transfer to the buyer and does not reserve right of disposal he is deemed to have been unconditionally appropriated the goods to the contract. Evidence on record clearly establishes that the defendant No.5 Mill Company had unconditionally appropriated the goods to the contract by delivery to the carrier and had not reserved the right of disposal at all. Thus the property in the goods having passed to the plaintiff, the plaintiff was the owner of the goods and was entitled to bring the suit for damage caused to the goods. In view of our above discussion, the appeal will have to be allowed and cross-objections filed by the defendant No.1 will have to be dismissed holding that the defendants Nos.1 to 5 are jointly and severally liable to the plaintiff for damage caused to the goods.

28. For the foregoing reasons, the appeal filed by the Union of India, owning Western Railways, succeeds. Decree passed against the appellant by the learned Single Judge which is impugned in the appeal is hereby set aside. The cross-objections filed by the original defendant No.1 are dismissed. The decree passed by the trial Court as confirmed by the learned Single Judge against the defendant No.1 is maintained and a decree in the same terms is also ordered to be passed against the original defendants Nos.2 to 5 with proportionate costs all throughout and with running interest at the rate of 6% per annum from the date of filing of the suit till the date of realization thereof. The defendants Nos.1 to 5 to bear their own costs. The suit against the defendant No.6 is dismissed. Office is directed to draw the decree in terms of this judgment.

(karan)